Supreme Court, U.S.
FILED
MAR 4 1999
CLERK

(14)

No. 98-830

In The

Supreme Court of the United States

October Term, 1998

AMOCO PRODUCTION COMPANY,
on behalf of itself and the class it represents,

Petitioners,

v.

SOUTHERN UTE INDIAN TRIBE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF AMICUS CURIAE INDEPENDENT PETROLEUM ASSOCIATION OF MOUNTAIN STATES IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICUS CURIAE* INDEPENDENT PETROLEUM ASSOCIATION OF MOUNTAIN STATES[1]

IPAMS respectfully submits this *amicus curiae* brief in support of Petitioners, Amoco Production Company, and the class members it represents. Pursuant to Supreme Court Rule 37.2, this *amicus curiae* brief is filed with the written consent of the parties.[2]

INTEREST OF THE *AMICUS CURIAE*

IPAMS is a regional trade association of over 1000 companies and individuals involved in the exploration, development, and production of crude oil and natural gas in the Rocky Mountains and Western United States. Many IPAMS members own oil and gas leases under which natural gas in coal bearing formations is being developed. The ownership of this gas is critically important to IPAMS members, who have relied upon the 1981 Solicitor's Opinion[3] in developing these resources. IPAMS foresees numerous hardships if the Court of Appeals' decision overturning these settled expectations is not reversed.

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[1] This brief is authored solely by counsel for *Amicus Curiae* Independent Petroleum Association of Mountain States ("IPAMS").

[2] Copies of the consent letters were concurrently filed with the Clerk of the Court.

[3] *Ownership of and Right to Extract Coalbed Gas in Federal Coal Deposits*, 88 I.D. 538 (1981) ("Solicitor's Opinion").

SUMMARY OF ARGUMENT

The Court's reading of the reservation of "coal" under the Coal Lands Acts of 1909 and 1910, 30 U.S.C. §§ 81, 83-85 ("the Acts"), will determine the ownership of natural gas in coal formations underlying 20 million acres of now-private land. This decision will affect the property rights of countless citizens who are not included in the class certified here, all of whom relied upon the Solicitor's Opinion. The construction given by this Court must harmonize with the Acts' purposes, the land classification system referenced in the Acts, and the uses Congress intended to preserve and convey under the Acts. Each of these demonstrate that Congress reserved to the public domain all hard rock coal of a sufficient minimum value, not coalbed gas. The inherent nature of gas, whether still in the coalbed or migrated to surrounding formations remains the same. It is gas and not coal. The plain and common meaning of the word "coal" does not include gas. In its decision overturning the ownership of gas in coal formations, the Court of Appeals ignored these facts and fashioned instead an artificial and strained interpretation that must be reversed.

I. AT STAKE HERE IS THE OWNERSHIP OF NATURAL GAS UNDERLYING 20 MILLION ACRES OF LAND.

This lawsuit affects countless parties beyond the class members identified with interests under the Southern Ute Indian Reservation. Private landowners, oil and gas lessees, royalty owners, and state and local governments across sixteen million acres of land, in seventeen

states, stand to lose their rights to natural gas in coal beds. Ownership of rights to coalbed gas is also at issue for another 4 million acres of land in which the government reserved only oil and gas under the 1914 Act. 30 U.S.C. § 121. Producers have relied upon the past ownership scheme to develop these gas reserves in areas such as the Raton Basin of Colorado, the Uintah Basin of Utah and the Powder River Basin of Wyoming. By providing tax incentives for producing gas in coal beds and other tight formations,[4] as well as issuing the Solicitor's Opinion regarding ownership of the gas, Congress encouraged producers to develop these gas reserves, which may now be taken away. If this Court ratifies the newly fashioned scheme, the prior equitable rights of these parties will be litigated against the federal government again and again.

The best evidence of Congressional intent is the interpretation given the Acts by the U.S. Department of the Interior ("Interior Department") in its 1981 Solicitor's Opinion. In reliance upon the Opinion concluding that gas in coal formations was not reserved to the United States under the Acts, thousands of coalbed gas wells have been drilled over the last 18 years. To independent producers, the federal government's recent abandonment of its longstanding Solicitor's Opinion, in order to seize the rights to coalbed gas, is unconscionable and frightening. If the new ownership regime is upheld, producers must separately lease coalbed gas under a whole new chain of title in order to acquire marketable title to this gas. In many instances they may have to produce gas in coal beds separate from gas in surrounding formations.

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[4] Section 29, Internal Revenue Code, 26 U.S.C. § 29.

That results in economic hardship, more expensive recovery processes and waste of natural gas.

Ultimately, however, this new title interpretation is most unfair to the countless heirs of those homesteaders who received patents under the Acts. These citizens are permanently disenfranchised from their property in favor of their sovereign. Ironically, the Acts were intended, in part, to alleviate the suffering and inequities created by the federal government's withdrawal of lands classified as valuable for coal, after the homesteading process had begun. *See* 1909 Act, 30 U.S.C. § 81; 43 Cong. Rec. H2503 (February 16, 1909). All of these adverse consequences are unjustified when a careful look at the meaning of the reservation of "coal" in the Acts is undertaken.

II. THE CONSTRUCTION GIVEN BY THE COURT MUST HARMONIZE WITH THE ACTS' INTENDED PURPOSES, THE LAND CLASSIFICATION SYSTEM AND THE USES CONGRESS INTENDED TO PRESERVE AND CONVEY UNDER THE ACTS, ALL OF WHICH DEMONSTRATE THAT NATURAL GAS WAS NOT INCLUDED IN THE RESERVATION OF COAL.

Much has been written about the historical framework in which the Acts were passed. *See, e.g., Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 47-50 (1983); *The Classification of the Public Lands*, U.S. Dept. Of Interior, U.S.G.S., Bulletin 537 (1913) ("Bulletin 537"); *see also* Brief of *Amici Curiae* the Coal Bed Methane Ad Hoc Committee *et al.* in Support of Petition, pp. 8-16. At that time, the federal government had implemented a classification system for public lands in which land was reviewed and classified

according to its mineral content. *Id.* The criteria for lands to be classified as "coal lands" was set forth in regulations of the Interior Department. *See Classification and Valuation of Coal Lands*, 37 Pub. Lands Dec. 653 (1909).

A. In Order to Achieve Its Objectives, Congress Made A Narrow Reservation of Only Coal.

When passing the Acts, Congress had two objectives: (1) to encourage the continued development of the West by homesteading; and (2) at the same time to preserve ownership of coal, the nations' primary energy source. *See, e.g.*, 45 Cong. Rec. H6042 (May 10, 1910). In order to accomplish these purposes, Congress deliberately made the mineral reservation narrow. It considered and rejected any number of broader proposals to include in the reservation minerals and "associated minerals," other than coal. For example, during debate over the passage of the 1910 Act, Congress considered, but did not adopt, the following proposed language:

> That all patents for land in the continental United States and the District of Alaska hereafter taken up under any of the public land laws of the United States shall contain an express reservation from the lands in said patent described, to the United States and its lessees of *all deposits of phosphate, oil, asphaltum, natural gas, coal, lignite, or associated minerals therein* and of the right to the use and occupation of so much of the surface of the land so patented as may be necessary to the mining, removal, and sale of said minerals.

45 Cong. Rec. H6162 (May 12, 1910) (emphasis added). Congress also considered, but rejected, the alternative of reserving natural gas:

> Mr. STEPHENS of Texas. Why is it necessary to preserve and reserve to the Government the coal and not at the same time reserve to the Government other fuels, such as gas and oil?
>
> Mr. MONDELL. Well, the gentleman has wandered off into a very large field, and there are a great many answers to that. One is, and the answer that really controls here, that coal crops out and comes to the surface, and its presence is therefore apparent. That coal extends under considerable areas of land is matter beyond all dispute and controversy. Geological horizons, running unbroken through large areas of territory carry with them unbroken, undiminished coal veins, so that is not difficult to determine approximately the probable extent and area of coal lands.
>
> Mr. STEPHENS of Texas. Is not the gentleman aware that oil is the same thing?
>
> Mr. MONDELL. Oil is found here and there. It is wherever you find it. Gas is found here and there. Oil and gas present much greater difficulties, when we propose to separate the surface from the mineral, than coal. I question whether we should provide for surface entries of such lands.

45 Cong. Rec. H6044 (May 10, 1910).

Instead, Congress accomplished its objectives by limiting the scope of the Acts to coal. And it tied the reservation of "all coal in said lands" to only those lands

classified as coal lands under Interior Department criteria. Thus the 1909 Act concerns those lands "classified . . . as being valuable for coal." 1909 Act, 30 U.S.C. § 81. Similarly, the 1910 Act concerns lands "which have been classified as coal lands." 1910 Act, 30 U.S.C. § 83. In some cases the lands had not yet been classified by the Interior Department. If they were subsequently "claimed or reported" as valuable for coal, or had been withdrawn pending classification, the lands were also subject to the Acts. *Id.* However, a homestead entryman could challenge the claim or even the land's classification as coal land, "with a view of disproving such classification and securing a patent without reservation." *Id.* at § 85. In such proceedings, the criteria set forth in the Interior Department regulations were applied to determine whether the claim or classification was valid. Bulletin 537, p. 65. If validated, homestead patents that issued for these lands would contain the reservation to the United States of the coal. *See, e.g.*, 45 Cong. Rec. H6041 (May 10, 1910). Since the classification system and the classification criteria formed the basis for the mineral reservation, a harmonious reading of the Acts requires that the meaning of "coal" as reserved thereunder be consistent with the meaning of "coal" set forth in those criteria.

B. The Land Classification Criteria Show That Coal Did Not Include Gas.

Neither the land classifications themselves, nor the regulations, support the interpretation that natural gas was included in the reservation of coal in the Acts. Under

the classification system, there were separate land classifications for (i) coal; (ii) oil and gas; (iii) phosphate; (iv) potash; (v) metalliferous minerals; and (vi) water resources. Natural gas was uniformly treated separately and apart from coal. In fact, it was classified only in tandem with oil. The Interior Department also recognized that oil and gas had markedly different physical qualities from coal. For example, contrary to coal, gas (and oil) were known as mobil substances capable of "migrating through varying thicknesses of pervious strata to their present places of accumulation." Bulletin 537, p. 112. Because of their migratory mobility, gas and oil required "variations from the type of procedure employed in classifying lands containing coal, phosphate or other stable minerals." *Id.* p. 7. As mentioned above, these differences were also recognized by Congress when the Acts were debated. *See supra* p. 6.

Similarly, the regulations do not support the position that natural gas was included with the meaning of "coal" reserved under the Acts. The regulations provided that all coal deposits be divided into four classes, all of which were solids: (A) Anthracite, semianthracite, coking and blacksmith coals; (B) high grade bituminous coking coals; (C) bituminous coals; and (D) low grade bituminous coals. 37 Pub. Lands Dec. at 653. Lands were given the classification "coal lands" only upon meeting minimum thickness and other criteria, none of which related to gas. For example, lands with class C coals "of any thickness at depths greater than 2000 feet *are noncoal lands, except* where the rocks are practically horizontal and the coal lies within two miles of the outcrop or point at which it can be reached by a 2000 foot shaft." *Id.* at 653-54.

(emphasis added). The coal was "valued" on the basis of the estimated recoverable tonnage, and a price per ton, taking into account accessibility and transportation to market factors. *Id.* Only where the coal met the threshold criteria was the land classified as coal land and made subject to a patent reservation of coal pursuant to the Acts. *Id.*

Consequently, not all coal was reserved by Congress pursuant to the Acts. The Court of Appeals misconstrued this point and found it persuasive that "Congress chose to reserve *all* the coal." Petitioner's Appendix ("Pet. App.") p. 29a (emphasis added). Likewise, the classification criteria contradicts the conclusion by the Court of Appeals that Congress intended to reserve all possible present and future value of the coal. Coals which were not considered valuable at that time were excluded from the reservation. Only lands with coal deposits meeting the minimum valuation criteria were subject to the reservation under the Acts. Significantly, under the classification system, the coal's value was determined solely from its hard rock fuel content, without any mention of gas. Nowhere was coalbed gas (then known as marsh gas) mentioned, valued, or giving any bearing on the land's classification as "coal land". Use of the classification system establishes the Congressional intent that portions of the coal resource not considered valuable at that time, as well as substances intermingled with the coal, such as ground water and natural gas, were not included in the reservation under the Acts.

C. The Appellate Court's Analysis Is Inconsistent With The Uses Reserved and Conveyed Under the Acts.

In its opinion the Tenth Circuit neither mentions the government's land classification system nor reconciles it with the purposes of the Acts. Those purposes are tantamount in determining the Acts' scope. *Dole v. United Steelworkers*, 494 U.S. 26, 35 (1990). Stated another way, in construing a land grant statute, the Court should give weight to the purpose of the reservation (and the purpose of the grant) that was being made. *Western Nuclear*, 462 U.S. at 47. Here the purpose of the reservation was to keep coal that was of a certain minimum value in public control. The purpose of the grant was to encourage homesteading of western lands. The classification system shows that coal, the black solid rock fuel, was being reserved. The homesteader was granted the surface of the lands and *all* other minerals, including oil and gas. Since oil and gas were conveyed without qualification, it is infinitely more logical to conclude that the homesteader received the natural gas in all formations, not that gas in coal seams was silently, or by implication, reserved to the United States.

Where a dispute exists as to whether a particular mineral resource is included in a reservation, it is also helpful to consider "the manner in which the material is extracted and used." *Western Nuclear*, 462 U.S. at 52. Here, coal and the right to "prospect for, mine, and remove the same" was reserved to the federal government. In contrast, the oil and gas were conveyed to the homesteader and along with it the rights to drill wells for recovery of same. In 1909 it was commonly known that natural gas

was recoverable by well drilling processes, not surface or underground mining. *See, e.g.*, Bulletin 537, p. 111. It strains credibility, therefore, to construe the Acts as providing coal miners the concomitant right to drill wells for natural gas in coalbeds, when their expertise lies elsewhere and no such uses were reserved under the Acts. *Western Nuclear* at 56. One does not "mine" for natural gas.

III. DISTINGUISHING OWNERSHIP OF NATURAL GAS IN COAL ROCKS FROM NATURAL GAS THAT HAS MIGRATED OR IS LOCATED IN SOURCE ROCKS OTHER THAN COAL IS UNSOUND AND IMPRACTICAL.

Contrary to the Court of Appeal's findings of the "unique nature of the CBM," natural gas in coalbeds is like any other natural gas. Natural gas is defined as:

> A naturally occurring mixture of hydrocarbon and nonhydrocarbon gases found in subsurface reservoirs within the Earth's crust. Methane (CH_4), a light hydrocarbon, is the primary constituent of natural gas and of principal interest to the energy industry.

See, e.g., U.S. Office of Technology Assessment, U.S. Natural Gas Availability, § 3, "Natural Gas Basics," 21 (1983); *accord* Norman J. Hyne, *Finding and Producing Oil and Gas*, 19-20 (Energy Textbooks Int'l 1985); A Primer of Oilwell Drilling, 89 (U. of Texas at Austin, 3d ed. 1978). Like other forms of natural gas produced for fuel, gas in coal seams contains these same hydrocarbons and is, in fact, primarily methane. *See, e.g.*, Potential Gas Committee, Colorado School of Mines, *Potential Supply of Natural Gas*

in the United States, "Natural Gas Resources in Coalbeds," p. 10 (March 1997) ("Potential Gas Report"). Likewise, gas from coal formations must be recovered by oil and gas drilling techniques and, once produced, is combined in the same pipelines with other gas and delivered to households and businesses.

Furthermore, as already discussed, Congress and the Interior Department recognized in 1909 that coalbed gas, like any other natural gas, is migratory in nature. In many areas the gas which presently exists in the surrounding strata originated in nearby coal seams. Over geological time, the gas migrated out of the coal and into other formations, such as sandstones and shale. Potential Gas Report, p. 11. There was no chemical transformation that accompanied the migration. *Id*. When the gas was in the coal it was gas, not coal, and when it migrated elsewhere it was still gas.

No logical basis has been established for defining the gas before migration as coal. Even the Tribe and the Tenth Circuit concede that once the gas migrates from the coalbed, it is like all other gases and belongs to the owner of the gas estate. Given this reality, it is error to conclude that while the gas exists in the coalbed, it is not "gas" but "coal" and therefore belongs to the owner of the coal estate. This artificial distinction creates enormous operational difficulties. In some places, due to deposition of sediments millions of years ago, sandstone and coal are interbedded and production from a zone will invariably include gas from both the sandstone and the coal reservoirs. In addition to the expense of "double leasing" for marketable title to the gas from both the oil and gas and coal owner, as a practical matter, it may be difficult or

impossible to determine if the gas is being produced from one source or the other.[5]

The Court of Appeal's attempt to use scientific anaylsis to construe the Acts is also flawed. It found that since the gas before migration was "trapped" or "adsorbed" to the coal, it was silly to suggest Congress would have intended to consider the gas separate and apart from the coal. However, it is doubtful that the 1909 Congress utilized such scientific analysis or considered whether other minerals were adsorbed to the coal. *See, e.g., Barber v. Gonzales*, 347 U.S. 637, 643 (1954) (technical reading appropriate only where statute indicates technical meaning was intended). Moreover, the fact that the gas and coal were adsorbed to one another does not change their separate natures.[6] In addition to coal, natural gas may be adsorbed to sandstones, shales or other source rocks. *See, e.g.*, Watson, A.T. *Adsorption Measurements in Devonian Shales*, Paper. No. SCA-9302, Society of Core Analysts Technology Conference, Texas A&M Univ. (1993). This adsorption is merely the way gas is stored in

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[5] *See, e.g., In re Application of Pendragon Energy Partners Inc. and J.K. Edwards Assoc. Inc. To Confirm Production from the Appropriate Common Source of Supply, San Juan County, New Mexico*, State of New Mexico, Energy, Minerals and Natural Resources Dept., Oil Conservation Division, Case No. 11996, Order No. R-11133 (February 5, 1999).

[6] Under Dept. of Interior definitions, "Adsorbed" means "to condense and to hold a gas on the surface of a solid, particularly metals". Similarly, "Adsorption" means "a taking up by physical or chemical forces of the molecules of gases, of dissolved substances or of liquids by the surfaces of solids or liquids with which they make contact." *A Dictionary of Mining, Mineral and Related Terms*, Dept. of Interior 1968).

that particular reservoir. The gas is not in those circumstances considered a mere constituent of that rock. Rather, it remains natural gas. To accept the Tenth Circuit's view, however, one must adopt the belief that in this particular instance, "gas" is merely a subset of "coal" and that in 1909 and 1910 Congress intended to adopt an incorrect scientific analysis not evidenced anywhere in the legislative history.

IV. THE PLAIN AND COMMON MEANING OF "COAL" SHOULD BE DETERMINATIVE.

The Appellate Court's strained analysis is unpersuasive because at the time Congress reserved the coal from the homesteaders' patents almost ninety years ago, the common man undoubtedly considered coal to mean the black, solid rock fuel used for heating and energy purposes. *See, e.g., Addison v. Holly Hill Fruit Products*, 322 U.S. 607, 618 (1944) ("legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him.") The common man was unlikely to consider (if he even thought about it), that marsh gas known to be a dangerous substance coexisting with coal, was a part of the coal.

It is the most basic tenet of statutory construction that the plain and common meaning of terms should control unless at odds with the statute when read as a whole. *See, e.g., United States v. Alvarez-Sanchez*, 511 U.S. 350, 357 (1994); *Smith v. United States*, 508 U.S. 223, 228 (1993); *Gustafson v. Alloyd Co. Inc.*, 513 U.S. 561, 570 (1995)

("This rule we rely upon to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words.") Coal in 1909 (and still in 1999), commonly meant "a black or brownish black solid combustible mineral substance". *See, e.g.,* District Court Opinion, Pet. App. pp. 110a-116a, (setting forth numerous definitions of coal as the solid rock fuel from this period). That same meaning was used to define coal in the classification system upon which the Acts were based. Given this overwhelming evidence of Congress' intent, little persuasive basis exists for the Tenth Circuit's ruling that the term "coal" is ambiguous as used in the Acts and therefore should be construed in favor of the sovereign. *Leo Sheep Co. v. United States*, 440 U.S. 668, 682-83 (1979).

CONCLUSION

For the foregoing reasons, IPAMS respectfully requests that the Supreme Court reverse the Tenth Circuit's ruling and find that natural gas in coal formations was not reserved under the 1909 and 1910 Acts.

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